SUPREME COURT, U. S.

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No. 121

In the Supreme Court of the United States

OCTOBER TERM, 1961

BAUER-SMITH DREDGING CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. 17-20) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on December 1, 1960. On March 1, 1961, the court denied a motion for rehearing. The petition for a writ of certiorari was filed on May 29, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether petitioner was entitled to indemnity from the United States for amounts paid by it to third

parties for damages resulting from its negligent performance of a government contract.

STATEMENT

On March 17, 1952, petitioner entered into a contract with the government for the dredging of a portion of the Gulf Intracoastal Waterway in Texas. The contractor was to furnish the material and perform the work as described in paragraph SW-1 of the specifications, which provided:

> (a) The work consists of furnishing all plant, labor, materials and equipment and performing all work in strict accordance with these specifications and the schedules and drawings for parts thereof for removing and disposing of all material lying above a plane 14 feet below mean low tide over a bottom width of 125 feet * * *. [Pet. 23.]

Paragraph SC-5 of the specifications required the work to conform to certain contract drawings and maps, of which Sheet No. 5 of the drawings is applicable to this controversy (Pet. 25). A levee and a ditch which lead into a reservoir used by landowners in the vicinity for irrigation (Pet. 19), were shown on Sheet 5.[1] This drawing contained a statement that no material should be allowed to enter this ditch (Pet. 46). It also stipulated that none of the material and water pumped from the waterway were to be deposited other than in the "spoil disposal areas" shown on the drawings (Pet. 50).

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[1] These are referred to in the Court of Claims opinion as the "canal."

Paragraph TP-3 of the specifications, pertaining to the disposal of the excavated material, read in part:

> The contractor shall take such precautions, including construction of new levees and or repair or raising of old levees, if deemed necessary to prevent spoil or waste water from flowing beyond the limits of the spoil disposal areas. All existing drainage outlets, both natural and artificial, shall be protected so that drainage will not be obstructed. If any material should enter a drainage outlet, it shall be promptly removed by the contractor at his expense. No material shall be allowed to enter any existing slip or small boat basin. [Pet. 19.]

Article 11 of the contract provided:

> *Permits and responsibility for work.* The contractor shall, without additional expense to the Government, obtain all required licenses and permits, and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance except for any completed unit thereof which may theretofore have been finally accepted. [Pet. 18-19.]

On September 23, 1952, the government's resident engineer issued a certificate of completion which stated in part that "the work was constructed in accordance with the original specifications and contract drawings as modified by approved change orders, and supple-

mental agreements," and recommended that the work be accepted by the contracting officer (Pet. 26-27). The latter certified the contract as satisfactorily completed in accordance with its terms; and stated that all materials removed from the waterway in the course of the dredging "were considered to be dumped in the proper disposal areas" (Pet. 51). On October 4, 1952, petitioner received final payment under the contract (Pet. 26).

On August 11, 1953, third parties commenced an action for damages against petitioner in a State court in Texas, alleging that petitioner was negligent in its disposition of the spoil. More particularly, they alleged that petitioner deposited material in places not designated in the contract, and also that it had allowed the spoil deposited in the designated areas to spill over into undesignated areas. The jury found that petitioner was negligent in permitting spoil and salt water to enter the fresh water canal shown on Sheet 5 of the drawings; that such negligence was a proximate cause of the third parties' damage; and that petitioner intentionally pumped spoil and salt water into the third parties' fresh water reservoir. Judgment of approximately $60,000 was rendered against petitioner (Pet. 30).

The Texas Court of Civil Appeals affirmed. It held, *inter alia*, that "the evidence supports the findings of the jury that the appellant was negligent in the performance of his contract and exceeded the authority granted and directions given in its contract with the government." The court also noted that "in none of its points of error on appeal does the appellant com-

plain of the sufficiency of the evidence in any way". *Bauer-Smith Dredging Co. v. Roy Tully, et al.*, 305 S.W. 2d 805, 816, certiorari denied, 358 U.S. 842.

In November 1958, petitioner submitted a claim to the contracting officer for the amount of the State court judgment and its expenses in defending the suit. The government informed petitioner that the final settlement of the contract in 1952 had rendered inoperative the administrative claims and appeals procedure under the contract. Thereafter, a claim filed by petitioner with the General Accounting Office was denied on the merits (Pet. 32-33).

On June 5, 1959, petitioner commenced this action in the Court of Claims. It sought recovery on the theory that it was the agent of the United States in the dredging operations; that it had performed the contract in accordance with the specifications and contract drawings, as evidenced by the government's certificate of completion and the acceptance of the work; that by such certificate and acceptance the government had adopted and ratified the acts of petitioner in the performance of the contract; and that petitioner was entitled, as a matter of law, to indemnity for the amounts expended by it in connection with the suit by the third parties.

Both parties moved for summary judgment. In a unanimous opinion, the Court of Claims denied petitioner's motion for summary judgment, granted the government's motion, and dismissed the petition. The court held, *inter alia*, that petitioner was not the agent of the government, but was an independent contractor; that, whatever the legal relationship between the

contracting parties, the contract expressly made petitioner responsible for all damages to persons or property that occurred as a result of its fault or negligence; that the judgment upon which petitioner's whole case was predicated was based upon petitioner's negligence as the proximate cause of the third parties' damages; and that there was "no basis whatever" for petitioner's contention that by acceptance of the work the government assumed responsibility for such acts of negligence by petitioner (Pet. 17-20).

ARGUMENT

This case presents no question of general or public importance in the field of government contracts warranting review by this Court. The decision below turns on the particular facts involved; it is clearly correct; and there is no conflict.

1. The Court of Claims correctly held that, under the specific provisions of the contract requiring petitioner to furnish "all plant, labor, materials and equipment" and to perform "all work" as set forth in the specifications, petitioner was not the agent of the government but, rather, was an independent contractor. The mere fact that the government exercised general supervision over the work, in order to insure that it was being properly performed, did not, in itself, make the contractor the agent of the government, or make the latter liable to third parties for the contractor's negligence. *Alexander* v. *Frost Lumber Industries, Inc.*, 88 F. Supp. 516 (W.D. La.), affirmed, 187 F. 2d 27 (C.A. 5); cf. *Gallagher* v. *United States Lines Co.*, 206 F. 2d 177 (C.A. 2). Nor is the government liable

for petitioner's negligence because Congress made the Secretary of the Army responsible for the dredging of navigable rivers. Cf. *Kirk* v. *United States*, 270 F. 2d 110, 117 (C.A. 9). *Yearsley* v. W. A. *Ross Construction Co.*, 309 U.S. 18, does not hold, as petitioner suggests (Pet. 12), that every contractor on a federal dredging project is automatically an agent of the government.[2]

As an independent contractor, petitioner was not entitled to reimbursement from the government for the damages it incurred due to its own negligent performance of the contract. In any event, under settled principles of agency, a principal is not required to indemnify his agent where, as here, the agent's harmful acts were of no benefit to the principal and were unauthorized or negligent. *Restatement, Second, Agency*, § 440.

2. Whatever the legal relationship of the parties, the express provisions of the contract preclude recovery by petitioner for its own negligence.[3]

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[2] The *Yearsley* case did not involve any issue of a contractor's right to indemnity from the government for his losses resulting from the negligent performance of his contract. In that case the question was whether riparian owners had any claim against a government contractor for damages due to erosion resulting from his performance of a dredging contract. It was conceded that all of the contractor's acts were authorized and directed by the government. This Court affirmed a judgment in favor of the contractor, on the ground that the landowners' remedy was a suit for just compensation in the Court of Claims.

[3] Sections 438 and 439 of the *Restatement, Second, Agency*, cited by petitioner (Pet. 3, fn. 5), are inapposite. The rules of indemnity there stated are expressly inapplicable in the case of unauthorized acts by the agent, or where there exists an agreement, such as in the present contract, making the agent liable for his own negligence.

Article 11 of the contract (*supra*, p. 3) made petitioner "responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work" (Pet. 18). Since the damages assessed against petitioner, for which it sought indemnity, resulted from its negligence in permitting spoil and salt water to enter the fresh water canal (see *infra*, pp. 9-10), this provision barred petitioner's recovery.

Petitioner argues that the provision should not be applied because its negligence occurred "while performing dredging work in accordance with Government plans and specifications" (Pet. 14). But petitioner did not follow the specifications. The drawings which were a part of the specifications showed the fresh water canal, and specifically directed petitioner to prevent the entry of any material into it.[4] Plainly, the contract provision was correctly applied by the court below to make petitioner bear the responsibility for its own negligent acts.

3. Contrary to petitioner's contention (Pet. 2, 10), there was no material factual issue that precluded granting the government's motion for summary judgment. The critical question, as the Court of Claims

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[4] The direction on Sheet 5 of the specifications that petitioner was to keep material out of the canal was clear and specific. Petitioner does not claim either that it complied with this specification or that it was unable to do so. Indeed, petitioner alleged in the present action that, in accordance with the provisions of the contract (Par. GC-2.), it "made a careful inspection of the dredging site prior to submitting its bid" (Pet. 35). There is nothing to indicate that petitioner ever advised the government, or even considered, that it could not comply with the prohibition against contaminating the canal.

properly ruled, was whether petitioner had been negligent in permitting spoil and salt water to get into the fresh water canal. The State court, in imposing liability upon petitioner for its actions, found that petitioner had been negligent. Since petitioner's suit against the United States for indemnity was predicated upon the state court judgment, the Court of Claims necessarily looked to the findings of the State court to determine the basis upon which it had held petitioner liable.

The Court of Claims properly treated the State court's findings of negligence as final for purposes of determining the government's liability in this action. Petitioner's suit, by its own statement, is one for indemnity (Pet. 8). Under the general rule in such cases, petitioner, in relying upon the earlier judgment, is bound by the findings respecting his own negligent acts upon which that judgment rested; and since these facts were, under the express provisions of his contract with the government, fatal to recovery against the United States, he could not successfully maintain the present action. *Restatement of Judgments*, § 107, comment h, p. 517; 30A Am. Jur., *Judgments*, § 424, p. 477; 42 C.J.S., *Indemnity*, § 32(2)b, p. 619.

There is no merit to petitioner's contention (Pet. 11) that the contracting officer, by accepting the work and certifying that it had been performed in accordance with the contract, thereby found that petitioner had not been negligent in permitting the spoil and salt water to get into the canal. The contracting officer merely determined that, as far as the government's requirements were concerned, the work met the con-

tractual specifications. In view of the specific provision in Article 11 that petitioner would be liable for its own negligence, the contracting officer obviously did not relieve petitioner of that responsibility by accepting the work as performed.

Petitioner contends (Pet. 11) that the decision below conflicts with principles enunciated in *United States* v. *Moorman*, 338 U.S. 457, and *Plumley* v. *United States*, 226 U.S. 545, governing the finality of determinations made by contracting officers under contract "disputes" clauses. But those principles are inapplicable to the instant case, where the contracting officer did not determine whether petitioner had been negligent toward third persons when he accepted the work for the government.

4. Contrary to petitioner's assertion (Pet. 14-15), the decision below poses no serious problem in the government's business relationships with its contractors. There is nothing novel in the holding that, on the facts, petitioner was an independent contractor; in any event, the decision is not contrary to any legal principles of indemnity cited by petitioner. The standard contract clause (41 U.S.C. App. 54.13) which precluded petitioner's recovery for its own negligence is unambiguous, and there is no need for its interpretation by this Court. A contractor who signs such a contract cannot be under any misapprehension that, if he performs the work negligently, he, and not the government, is responsible for such negligence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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